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No. 95-813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BRAD BENNETT, ET. AL.

Petitioners,

v.

MARVIN PLENERT, ET. AL.

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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The National Association of Home Builders of the United States ("NAHB") has received the written consent of the parties to file this brief in support of petitioners, and has filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The NAHB represents more than 180,000 builders and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.[1]

The Building Industry Legal Defense Foundation ("BILD") is a not-for-profit corporation organized under the laws of the state of California. The BILD is a wholly owned subsidiary of the Building Industry Association of Southern California ("BIA-Southern California"). BIA-Southern California is an NAHB affiliate with over 1400 members involved in all aspects of the building and construction industry. BIA-Southern

[1] The NAHB has been before this Court either as an *amicus curiae* in support of, or as of counsel on behalf of, the property owner in prior cases involving government land use decisions. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The NAHB brief was cited approvingly in this Court's *Nollan* opinion, 483 U.S. at 840.

California members are involved in the construction of 70% of all new homes in the Southern California Region.[2]

The interests of the NAHB and BILD (collectively the Building Industry Amici) lie in seeing that the implementation of laws concerning or affecting the use of private property remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with government actions which impinge on constitutional guarantees.[3] The Building Industry Amici have a particular interest in the administration of federal environmental statutes such as the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), given the far-reaching impact that these laws have upon private land use and land-use regulation.[4]

The Building Industry Amici believe that this brief will assist the Court in making its decision whether to grant review of the issues presented in the Petition. The Building Industry Amici's concerns are much broader than those of petitioners, since its members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land. The Building Industry Amici's brief addresses the broader public policy reasons why review should be granted.

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[2] The BILD's mission is to "[d]efend the legal rights of home and property owners." The BILD promotes and supports legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

[3] As Justice Brandeis insightfully admonished:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

[4] NAHB and BILD have filed an action against Secretary Babbitt — *NAHB v. Babbitt*, Civ. No. 1:95CV01973 RMU (D.D.C. 1995) — challenging the Interior Department's authority to enforce certain provisions of the Endangered Species Act of 1973 ("ESA") in connection with its listing of the Delhi Sands Flower-loving Fly as endangered. That action involves standing issues similar to those raised by petitioner in this case.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Court should grant Petitioner's writ because the lower court has decided a question of national importance in a way that conflicts with this Court's precedents. Moreover, the effect of the lower court's decision is to abrogate the rights of an enormous class of citizens to seek legal redress in the face of ever burgeoning federal regulations.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit's decision held that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA."[5] According to that court:

> Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort 'are more likely to frustrate than to further statutory objectives.'[6]

As argued below, the issue of standing to challenge ESA determinations is of critical importance to property owners generally, and the Building Industry Amici's members specifically. The Ninth Circuit has neutered property owners' ability to protect themselves in court from unlawful ESA regulation. Moreover, the Ninth Circuit only reached its decision by ignoring the will of Congress and by rewriting this Court's prudential standing test.

A. ESA Standing Is A Critical Issue For Property Owners Throughout The Country

The impact of the Ninth Circuit's decision cannot be understated. As this Court recognized in *Babbitt v. Sweet Home Chapter*

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[5] *Bennett v. Plenert*, 63 F.3d 915, 919 (9th Cir. 1995).

[6] 63 F.3d at 919.

of Communities for a Great Oregon, 115 S. Ct. 2407 (1995), the ESA provides for the federal regulation of land which constitutes endangered species' habitat. Some 965 species are currently listed as endangered or threatened in the United States, most of which have habitat on private property. As of May 1993, 90% of the 781 species listed as endangered or threatened under the ESA inhabited non-federal lands. Of these listed species, 517 had over 60% of their total habitat on non-federal lands.[7]

The habitat for these species and the 184 species that have been listed as endangered or threatened since May 1993 covers tens of millions of acres, much of it private property, and hundreds, if not thousands, of river miles. The Secretary has already designated critical habitat for some 115 species covering millions of acres.[8] As this Court held in *Sweet Home*, Section 9 of the ESA prohibits the taking of endangered animals, including modification of habitat which impairs behavioral patterns, without a permit. Thus, the listing of a species in effect results in federal regulation of all of that species' habitat wherever it happens to be found. Moreover, Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions do not jeopardize the continued existence of an endangered or threatened species. 16 U.S.C. § 1536(a)(2). In addition, the designation of critical habitat imposes on all federal agencies an obligation to ensure that their actions will not result in the adverse modification of that critical habitat. *Id.* These obligations extend to all types of

[7] *See* General Accounting Office, Endangered Species Act: Information on Species Protection on Non-Federal Lands, 4-5 (Dec. 1994).

[8] For example, the Secretary has designated approximately 6.9 million acres as critical habitat for the Northern spotted owl, 57 Fed. Reg. 1796 (1992); 4.6 million acres for the Mexican spotted owl, 59 *Fed. Reg.* 5827 (1994); and 6.3 million acres for the gray wolf, 50 C.F.R. §17.95 (a). In addition, the Secretary has designated 1,980 miles of the Colorado River and its tributaries as critical habitat for four fish species, 59 *Fed. Reg.* 13374 (1994); and has designated the entire Sacramento – San Joaquin River delta — which lies at the heart of the water system serving much of the State of California — as critical habitat for the delta smelt, 59 *Fed. Reg.* 65256 (1994).

federal actions, including actions relating to private property, *e.g.*, federal funding for state, local, and private projects; issuance of federal permits to discharge dredged or fill material into wetlands and other waters of the United States pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344; issuance of other permits under the Clean Water Act, 33 U.S.C. §§ 1251-1387; and the Clean Air Act, 42 U.S.C. §§ 7401-7671q; and, the provision of federal flood insurance, *see Florida Key Deer v. Stickney*, 864 F. Supp. 1222 (S.D. Fla. 1994).[9] These prohibitions are likely to be extended to tens of millions of additional acres in the future as the Secretary designates critical habitat for some of the 800 endangered and threatened species currently lacking critical habitat designations or some of the more than 3000 species that are currently candidates for listing under the ESA.[10]

Thousands of consultations are conducted every year under Section 7. *See* General Accounting Office, Endangered Species Act: Types and Number of Implementing Actions 30 (1992)

[9] Thus, no comfort can be drawn from the Ninth Circuit's disclaimer that it was not ruling on the standing of directly regulated parties, but rather only on indirectly regulated parties. 63 F.3d at 917, n.2. The effect of an ESA regulation upon the regulated party is just as real when filtered through another federal agency.

[10] For instance, the Secretary has proposed to designate 4.45 million acres in three states as critical habitat for the marbled murrelet, 60 *Fed. Reg.* 40892 (1995), 860,000 acres of lake, stream and shoreline for the Lost River sucker and the shortnose sucker, 60 *Fed. Reg.* 5893 (1995), and 20,000 acres on 210 miles of coastline (10% of the California, Oregon and Washington coastline) for the Western snowy plover, 60 *Fed. Reg.* 25882 (1995). The Secretary at one time considered a proposal to designate portions of 33 Texas counties as critical habitat for the Golden-cheeked Warbler. Scott Harper, *Endangered: Species or Rights*, Houston Post, August 28, 1994 at A1. Other newly listed and candidate species also have extensive ranges. The Southwestern willow flycatcher is thought to inhabit portions of seven states. 60 *Fed. Reg.* 10694 (1995). The Northern goshawk, a species which the Secretary has determined may warrant listing as endangered or threatened, is found throughout much of the conterminous United States. *See* 59 *Fed. Reg.* 58982, 58990 (1994) (goshawk historically has nested in 26 states and regularly visited 19 others).

(over 18,000 consultations conducted during the period FY 1987 to FY 1991). These numbers have increased as more species are added to the list of endangered and threatened species. These consultations can have a substantial impact on property owners. However, due to their "competing interest"[11] (*i.e.* — the desire to use their land), property owners under the jurisdiction of the Ninth Circuit will not be able to challenge these consultations no matter how substantially or directly they are affected. Moreover, while this case involves a Section 7 consultation, the rationale of the Ninth Circuit's decision has already been extended to deny similarly situated parties standing to challenge a decision to list a species. *See Idaho Farm Bureau Fed'n v. Babbitt*, 900 F. Supp. 1349 (D. Idaho 1995). This rational would extend to critical habitat designations as well.

Thus, the Ninth Circuit decision shuts the courthouse doors to those who are most affected by a wide range of decisions under the ESA.

B. The Ninth Circuit Decision Ignores The Will Of Congress

The Building Industry Amici agree with petitioners that it was error for the Ninth Circuit to apply the zone of interests test to the subject ESA claims. Congress clearly and unequivocally extended standing under the ESA to the limits of Article III of the United States Constitution through its enactment of 16 U.S.C. § 1540 (g)(1). That provision allows *any* person to bring suit to challenge the Secretary's actions under the ESA.

The term "person" is liberally defined in the ESA to mean:

> an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department or instrumentality of the Federal government, of any State or political subdivision thereof, or any foreign government.

[11] 63 F.3d at 921.

16 U.S.C. § 1532 (13). Notably, there is no qualification within this definition such as to exclude a "person" with a "competing interest" or to restrict standing to a person who *only* seeks to further the ESA's statutory objectives. Rather, the standing conferred under the ESA is broad, open-ended, and inclusive.

C. The Ninth Circuit Decision Rewrites The Zone Of Interests Test

Assuming *arguendo*, that the zone of interests test does indeed apply to ESA claims, the Ninth Circuit's decision misapplied the test completely, rewriting the test so as to exclude those persons *regulated* by the ESA.[12] This is contrary to this Court's clear mandate that the zone of interests test included those whose interests fall within either the "zone of interests to be protected *or* regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added). *See also Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987).

Both petitioners and the Building Industry Amici's members clearly fall within the category of those Congress intended to regulate under the ESA. Through the "take" provisions contained in 16 U.S.C. § 1538, along with the permitting provisions of 16 U.S.C. §§ 1536 and 1539, and the accompanying regulations, the ESA acts to closely regulate the use of land which may be occupied by listed endangered species.[13] Individuals are prohibited from harming endangered animals, including habitat modifications which significantly impair an animal's behavioral patterns. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995). These provisions become effective as soon as a species is listed as endangered, requiring

[12] This group would include not only petitioners, but the Building Industry Amici's members, as well as most all property owners and users generally.

[13] The "use of land" is, of course, the foundation — both literally and figuratively — of the building and construction industry. Moreover, in this case, petitioners are regulated in their use of the water which constitutes the habitat of the Lost River sucker and the short nose sucker.

landowners to immediately conform their conduct to this requirement.[14] Therefore, there can be no argument that petitioners are regulated by the ESA. As such, petitioners should have standing to challenge ESA determinations in court.

D. The Ninth Circuit Decision Closes The Courthouse Door On Regulated Parties

The United States Constitution, Article III, limits the jurisdiction of the federal courts to the resolution of "cases" or "controversies". *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Common sense dictates that the essence of an "actual case or controversy" would necessarily involve the existence of "competing interest[s]". The Ninth Circuit, however, in its zeal to ensure the primacy of endangered species protection, prevents any meaningful challenge to the Secretary's actions. By virtue of its decision, only those "persons" with a particular set of "competing interest[s]" will be allowed to bring a court challenge under the ESA. Thus, while environmental interest groups will be free to act to enforce the ESA to its maximum potential, those "persons" who bear the burden of the ESA regulation — property owners — will be at the mercy of the Department of the Interior.[15] In the event that a species is mistakenly or improperly listed, the regulated parties who have an interest in correcting the mistake, will be forced to rely upon the non-regulated parties

[14] As this Court noted, the ESA "encompasses a vast array of economic and social enterprises and endeavors." 115 S.Ct. at 2418.

[15] "Those whom the agency regulates have the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress." *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

who have no interest in (and, indeed, may be opposed to) correcting the mistake.[16]

The ability to protect one's interests in court historically has constituted a fundamental American right. Yet the Ninth Circuit's decision in this case abrogates that right for those who possess a "competing interest" with an endangered species. In other words, property owners will have to trust the Department of the Interior to administer the ESA in a manner which does not infringe upon their rights. Moreover, environmental groups who may oppose property development and growth will be able to use the ESA as a sword to prevent property owners' activities; the property owners, however, will be without the means to defend themselves. This result raises due process concerns and could not have been within the intent of Congress.

[16] The NAHB and its affiliate, the Texas Capitol Area Builders Association, have filed just such an action. In *NAHB and TxCBA v. Babbitt*, C.A. No. 1:95CV01374 RMU (D.D.C. 1995), the district court has been asked to invalidate a final rule listing 2 species as endangered under the ESA which was promulgated without undergoing the requisite notice and comment process.

CONCLUSION

Therefore, for the reasons stated above, and in the Petition for Writ of Certiorari, the NAHB and the BILD pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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